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DEVELOPMENTS IN LABOR AND EMPLOYMENT LAW IN THE UNITED STATES (JANUARY 2019 - AUGUST 2019)

I - UNITED STATES SUPREME COURT

Supreme Court precedent has established the enforceability of consumer arbitration agreements and mandatory employment arbitration agreements in non-union workplaces¹. Such arbitration agreements often require consumers or employees to waive their rights to litigate claims or to bring class action arbitrations². In *Lamps Plus v. Varela*³, the Supreme Court extended this line of precedents, holding in a 5-4 decision that an employment arbitration agreement that was ambiguous about class action arbitrations did not provide employees with the contractual right to bring a class arbitration. The dissenting justice criticize the Court majority for ignoring basic principles of contract law that construes ambiguities against the drafter of the contract. The dissent further decries the lack of fairness in favoring employer power to force employees to bring only individual arbitration claims.

In *Kisor v. Wilkie*⁴, the Supreme Court confirmed the validity of its precedents holding that courts should defer to federal administrative agencies' interpretation of their own regulations where those regulations are genuinely ambiguous. This case outcome is significant and positive given consumer, environmental and labor advocates' concern that the Court's conservative justices may overrule precedents that give deference to expert agencies' interpretations of ambiguous language in the statutes they enforce, including legislation protecting workers' rights and the environment. Similar to its precedents concerning agency regulations, the Supreme Court has held that judges should defer to federal agencies' reasonable interpretations of ambiguous language in the statutes they enforce⁵.

II - NATIONAL LABOR RELATIONS BOARD (NLRB)

The NLRB currently has four of five seats filled, with three filled by conservative appointees nominated by President Trump and confirmed by a conservative U.S. Senate. Only one of the four members is a more liberal appointee who had been nominated by President Obama. The NLRB has continued its pattern of overruling Board precedents with the result of significantly undermining employee rights to engage in unionization, collective bargaining, and other protected concerted activity.

Two decisions by the NLRB create obstacles to employees' protected concerted activity on private property at the workplace. In both cases, the NLRB places excessive weight on employer private property interests to the detriment of employee rights under the National Labor Relations Act (NLRA)⁶. In *UPMC*⁷, the NLRB held that an employer may bar union representatives from access to public areas of the workplace. In this case, the employer was

1 *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

2 *DIRECTV v. Imburgia*, 136 S.Ct. 463 (2015).

3 139 S. Ct. 1407 (2019).

4 139 S. Ct. 2400 (2019).

5 *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

6 29 U.S.C. §151 et seq.

7 368 NLRB no. 2 (2019).

a hospital that ejected union organizers from its hospital cafeteria where the organizers were having lunch with hospital employees and discussing unionization. The Board found no relevant distinction between an employer barring access to public and private areas of the hospital. The employer's action would violate the NLRA only if the employer discriminated in the access it gave to other nonemployee groups as compared to the union, or if the union had no alternate means of contacting the employees.

In *Bexar County Performing Arts Center Foundation*⁸, the NLRB creates similar obstacles to private property access, in this case by off-duty employees. In this case, a privately owned center for the performing arts leased performance space to a Symphony, whose off-duty employees engaged in informational leafleting on a sidewalk located in the center's private property. The Symphony employees, who were unionized musicians, were protesting the use of recorded music by a ballet company that also leased performance space at the center. The Board held that the private property owner may refuse access to its property by off-duty employees of a contractor business if the contractor's employees do not work regularly and exclusively on the property and if those off-duty employees have a reasonable alternative means to communicate their message.

Two other decisions by the NLRB give employers ammunition to refuse to collectively bargain with unions. One decision concerns an employer's « anticipatory withdrawal of recognition » of the union. In this situation, near the end of a collective bargaining agreement, an employer states that it will withdraw recognition from the union when the contract expires based on evidence, such as an employee petition, that the union has lost majority support. In *Johnson Controls, Inc.*⁹, the Board decided that to demonstrate its majority status, the union must file a petition for an election within 45 days from the employer's anticipatory withdrawal. This is a major change from Board precedent holding that a union could provide evidence, such as a counter petition by employees, showing that it had not lost majority support. Prior Board precedent had also held that an employer could file a petition for an election if the employer has a good faith belief that the union had lost majority support. Instead, this new standard under *Johnson Controls* places the full burden and risk on the union to respond to the employer's anticipatory withdrawal by filing a petition and winning a majority vote in an election.

The NLRB also made it easier for a successor employer in a unionized workforce to avoid bargaining with the union over the initial terms and conditions of employment. Under long-standing Supreme Court precedent a successor employer may unilaterally set the initial terms and conditions of employment in a unionized workplace¹⁰. However, if it is clear that the successor employer plans to retain all of the employees in the predecessor's bargaining unit, the successor must bargain with the union over the initial employment terms and conditions¹¹. NLRB precedent had also established that where a successor employer discriminatorily failed to hire some predecessor employees in order to avoid a bargaining obligation, the remedy includes ordering the successor to bargain with the union over initial terms and conditions of employment. The NLRB overruled this precedent in *Ridgewood Health Care Center*¹², holding that such a remedy is not appropriate unless the successor employer's discriminatory actions made it impossible to determine whether it would have hired all or substantially all of the predecessor unit employees absent the hiring discrimination.

8 2019 NLRB LEXIS 468 (2019).

9 368 NLRB no. 20 (2019).

10 *NLRB v. Burns Security Services, Inc.*, 406 U.S. 272 (1972).

11 *Ibid.*

12 367 NLRB no. 110 (2019).